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Case No. 80-85

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

A. J. TAYLOR, individually and as Secretary of the Department of Health and Rehabilitative Services of the State of Florida,

Petitioner,

vs.

GOLDEN ISLES CONVALESCENT CENTER, INC., d/b/a Hallandale Rehabilitation Center, etc., et al., and PATRICIA HARRIS, as Secretary of the U. S. Department of Health and Human Services,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court has exclusive federal court jurisdiction over suits in which the state is a party.

2. Whether the U. S. District Court for the Southern District of Florida has venue over an action to compel a state agency located in the Northern District of Florida to execute and file on behalf of the state a state Medicaid plan with the federal government.

PARTIES TO THE PROCEEDING

Golden Isles Convalescent Center, Inc.; Isaac Mizrahi; Jackson Manor Nursing Home; Palmetto Extended Care Center; Snapper Creek Nursing Home; Sunset Nursing Homes, Inc.; Krest View Nursing Home, Inc.; Pinecrest Convalescent Home, Inc.; Townhouse Convalescent Center, Inc.; High Ridge Management

Corp.; Centers for Living, Inc.; Dania Nursing Home, Inc.; Greynolds Park Manor Rehabilitation Center; Washington Manor Nursing & Convalescent Home, Inc.; Golf View Nursing Home, Inc.; Miami Convalescent Home, Inc.; Four Freedoms National Medical Services, Inc.; Royal Glades, Inc.; Coral Pines, Inc.; Pinehurst Convalescence Facility; H.B.A. Corporation, and American Health and Rehabilitation Center, Inc., all being nursing homes located in the Southern District of Florida.

A. J. Taylor, individually, and as Secretary of the Department of Health and Rehabilitative Services, and the Department of Health and Rehabilitative Services.

Patricia R. Harris, Secretary, U. S. Department of Health and Human Services.

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OPINIONS BELOW

The opinion of the Court of Appeals, Fifth Circuit, is not yet officially reported, but is set forth in Appendix I. That opinion affirms the decision of the United States District Court for the Southern District of Florida reported at 442 F. Supp. 201 (S.D.Fla. 1977).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 16, 1980. Request for rehearing was filed only in that one of the two consolidated cases not herein sought to be reviewed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, § 2, clause 2:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

28 U.S.C. § 1391.

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

STATEMENT OF THE CASE

Congress enacted 22 USC § 1396a(13)(E) which required, effective July 1, 1976, that the state participants in the Medicaid nursing home program provide reimbursement on a reasonable cost-related basis to skilled

nursing home facilities.

The U. S. Department of Health, Education and Welfare (HEW), by 45 C.F.R. § 250. (a)(3)(4), delayed the requirement until January 1, 1978, as an exercise of executive discretion not to enforce the congressional enactment. The U. S. District Court for the Southern District of Florida found the HEW regulation unconstitutional, ordered the state to submit a new state plan to HEW which was to be approved by HEW only should it find that the new plan provided for reimbursement on a reasonable cost-related basis, and required that the state plan provide for reimbursement back to the date of the Court's order.

The order was entered pursuant to complaint filed by the nursing home providers against the Department of Health and Rehabilitative Services of the State of

Florida. Defendant, by motion to dismiss, raised lack of venue in the Southern District of Florida to compel state action in the state capital in the Northern District of Florida of filing a new state plan with the federal government. The motion further raised the issue of exclusive original jurisdiction in the U. S. Supreme Court and of 11th Amendment immunity against a suit brought by private providers which sought and achieved a mandatory injunction compelling the state through its agent to enter into a new contractual relationship with the federal government.

Subsequent to the entry of the order, the case was consolidated with a similar case involving the Medicaid nursing homes throughout the remainder of the state. An appeal involving each of the two cases was filed in the U. S. Court of Appeals, Fifth Circuit, and such appeals were consolidated

for purposes of the decision. A petition for rehearing was filed in the case not herein sought to be reviewed, but no petition for rehearing was filed in the case sub judice. Review is sought at this time because the case of First Nat'l Bank v. Louisiana Tax Comm'n, 289 U.S. 60, 77 L. Ed. 1030, 87 A.L.R. 840 (1933), is of doubtful precedence in authorizing review of the consolidated case in which no petition for rehearing was filed.

BASIS OF TRIAL COURT JURISDICTION

The jurisdiction of the trial court is conferred by 28 U.S.C. § 1331, the case being one arising from the Federal Social Security Act and involving in excess of $10,000.00.

REASONS FOR ALLOWANCE OF THE WRIT

1. WHETHER THE UNITED STATES SUPREME COURT HAS EXCLUSIVE JURISDICTION OVER SUITS IN WHICH THE STATE IS A PARTY.

The constitutional draft which preceded the final product of the constitutional convention directly provided for concurrent jurisdiction in the Supreme Court and inferior federal courts created by Congress. Thus § 3 of Article XI of the proposed draft as it appears in 5 Elliot's Debates 380, is as follows:

> Sect. 3. The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other than public ministers and consuls; to the trial of impeachments of officers of the United States, to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, (except such as shall regard territory or jurisdiction;) between a state and

> citizens of another state; between citizens of different states; and between a state, or the citizens thereof, and foreign states, citizens or subject. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned, (except the trial of the President of the United States,) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.

The draft's provision for concurrent jurisdiction was then modified to the present form over the five weeks following the draft, and preceding the September 11, 1787 Convention. Approval of the Constitution in its present Article III, § 2, clause 2 form, which is as follows:

> In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be

> a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The reason for striking the concurrent jurisdiction provision is set forth in The Federalist, No. 81, wherein Alexander Hamilton, one of the dominating forces at the Convention, makes the following explanation and guarantee to the states whose ratification of the Constitution was a necessary prerequisite to its efficacy.

> The supreme court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers and consuls, and those in which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well as for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient

> and proper, that such questions should be submitted in the first instance to the highest judiciary of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal. (The Federalist, No. 81 at 548.) (Emphasis supplied.)

The potency of Federalist No. 81 as an interpretative guide to the U. S. Constitution was recently reasserted by this Court in footnote 9 of Edelman v. Jordan, 417 U.S. 651, 39 L.Ed. 2d 662.

The U. S. Supreme Court in the fifth case considered by such body, State of Georgia v. Brailsford, 1 L.Ed. 433 (August Term 1792), speaking through Mr. Justice James Iredell, who was a member of the North Carolina Convention approving the new constitution, stated:

> . . . These facts, however, are only mentioned to introduce this remark, that the circuit court could not, with propriety, sustain the application of Georgia; however, whenever a state is a party, the supreme court has exclusive jurisdiction of the suit; and her right cannot be effectually supported, by a voluntary appearance, before any other tribunal of the union. . . . State of Georgia v. Brailsford, 1 L.Ed. 433, at 435. (Emphasis supplied.)

Then in reconsideration of the same case, Mr. Justice Iredell stated:

> . . . In this situation it must, likewise, be considered, Georgia had not a constitutional right to institute such a suit, nor could she, in my opinion, be admitted as a party to a proceeding in the nature of an interpleader, in any, but the supreme court. State of Georgia v. Brailsford, 1 L.Ed. 438, 439.

Mr. Justice Blair made comparable observations:

> Since, therefore, there is no other court, that can bring all the parties before them, and do general and complete justice, it is my opinion, that the bill in equity ought to be sustained; and that the subject should be no further referred to a court of law, than to obtain an opinion upon the

> legal title to the debt in controversy. State of Georgia v. Brailsford, 1 L.Ed. 438, at 440.

That the observations were not in the nature of dicta is shown by footnote 1, 1 L.Ed. 440, which establishes that the case was tried before the Supreme Court as an action in which the state was a party even though it had been commenced in the circuit court as one between nonstate parties. See Georgia v. Brailsford, 1 L.Ed. 483. As was recognized in Chisholm v. Georgia, 1 L.Ed., 440, the first judicial act provided that the Supreme Court jurisdiction over suits between a state and its citizens and between a state and citizens of another state or aliens was not exclusive but this meant the jurisdiction was concurrent with state courts, not with lower federal courts. The previously discussed holdings clearly show the early acceptance of the proposition

that states could not be made parties before the lower federal courts. Indeed, the judicial act in setting out the powers of the district and circuit courts made no attempt to include any suit in which a state was a party. See §§ 9 - 12 of Ch. XX, Acts of the 1st Congress of the United States. This concept is verified by the case of Respublica v. Cobbett, 1 L.Ed. 683, wherein it was held by the Supreme Court of Pennsylvania that a suit between a state and an alien could not be removed from the state court to the circuit court because the concurrent jurisdiction referred to in the judicial act was concurrent state jurisdiction and did not encompass lower federal courts.

In the case of Marbury v. Madison, 1 Cranch 137, 174-175, 1 L.Ed. 60, Mr.

Justice Marshall supported the concept that the original jurisdiction was exclusive by setting forth the following:

> When an instrument organizing fundamentally a judicial system, divides it into one supreme and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. Marbury v. Madison, supra, at 174-175.

(The exclusive nature of original jurisdiction in these observations by Mr. Justice Marshall was recognized in Ames v. Kansas, 28 L.Ed. 482, but was dishonored in that ruling which first began the trend that the lower federal court could consider suits

involving the states.)

In the case of Osborne v. The Bank of the United States, 6 L.Ed. 204, Mr. Justice Marshall, after stating that appellate jurisdiction of the judicial power cannot be exercised in those cases in which original jurisdiction is given the Supreme Court, stated:

> . . . With the exception of these cases, in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. . . . 6 L.Ed. 204 at 224.

Then in Bank of United States v. Planters' Bank of Georgia, 6 L.Ed. 244, Mr. Justice Marshall reaffirmed exclusiveness by stating:

> Is the state of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this court have

> entertained jurisdiction in this case?
>
> We think it could not. To have given the Supreme Court original jurisdiction, the state must be plaintiff or defendant as a state, and must, as a state, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the state of Georgia than against any other individual corporator. The state is not a party, that is, an entire party, in the cause. Bank of United States v. Planters' Bank of Georgia, 6 L.Ed. 244.

In Governor of Georgia v. Sundry African Slaves, 7 L.Ed. 73, Mr. Justice Marshall in acknowledging that the circuit court could not consider a suit involving the state because of exclusive jurisdiction in the Supreme Court, stated the following:

> The decree cannot be sustained as against the State, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit, prosecuted not against the State, but against the thing, because the thing was not in possession of the

District Court. Governor of Georgia v. Sundry African Slaves, 7 L.Ed. 73, at 80.

In Wisconsin v. Duluth, 2 Dill. 406, 11 Am. Law. Reg. 709, Federal Cases No. 17,902, the circuit court after a detailed analysis that inasmuch as the Supreme Court has no appellate jurisdiction in cases designated to be subject to its original jurisdiction and noting the anomaly of the circuit court not being subject to review when it considered cases in which a state was a party, determined that where the state was a party jurisdiction was exclusively that of the Supreme Court and dismissed for want of jurisdiction the suit brought by the state of Wisconsin complaining against interference with navigable waters by the City of Duluth. The court cited Gale v. Babcock, Federal Cases No. 5,188, and North Carolina v. Trustees

of University, Federal Cases No. 10,318, for comparable holdings.

Alexander Hamilton, in The Federalist, No. 81, page 552, gave an additional assertion of the guarantee that suits involving the states would not be tried by the lower federal courts. Note the following:

> . . . that in the partition of this authority a very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals— . . ..

This guarantee was made nine months after the convention and shortly before state ratification.

. It is clearly established that Congress cannot give additional appellate jurisdiction to the United States Supreme Court. See Ex parte Vallandghan, 68 U.S. 243, 17 L.Ed. 589. Article III, §2, clause 2, clearly indicates that appellate jurisdiction does not apply to those cases of

which the Supreme Court has original jurisdiction. (Note that the clause specifically provides that the appellate jurisdiction of the Supreme Court applies to all other cases, other cases being cases not listed for original jurisdiction.) Therefore, to permit the lower federal courts to entertain original jurisdiction where the state is a party would logically result in this state not being able to appeal to the United States Supreme Court; a result which clearly indicates the incorrectness of the federal district courts entertaining original jurisdiction of suits in which the state is a party.

It is acknowledged that in the past the Supreme Court for convenience of its calendar has often stated that the district courts should have concurrent jurisdiction in suits in which the state was a party.

The position asserted will not unduly impose on the Court's calendar. Federal district judges can serve as commissioners to the Supreme Court for cases involving the state and the labors of the circuit court will be conserved for nonstate cases. The country is at a crossroad in its economic destiny. Clearly, the initial and direct guidance of the Supreme Court in cases of the nature herein presented wherein is involved over twenty-five million dollars of the commonwealth of the state should be afforded that dignity guaranteed by the Constitutional Convention. To give the states a guarantee of no exposure to lower federal court mandates as an inducement to ratify the Constitution and then abrogate such commitment constitutes an injustice. A return to the original intent records for history that rule of law is indeed higher than the

desires of men.

2. WHETHER THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA HAS VENUE OVER AN ACTION TO COMPEL A STATE AGENCY LOCATED IN THE NORTHERN DISTRICT OF FLORIDA TO EXECUTE AND FILE ON BEHALF OF THE STATE A STATE MEDICAID PLAN WITH THE FEDERAL GOVERNMENT.

Article III, §2, Florida Constitution, provides that the seat of government shall be the city of Tallahassee in Leon County, Florida. The petitioner Department of Health and Rehabilitative Services and the defendant the chief executive of such department are located in Leon County, Florida and exercise the executive power specified in Article IV, §6, Florida Constitution,

which provides for executive functions being exercised by twenty-five statutory departments. The statutory authority creating the Department of Health and Rehabilitative Services is given by § 20.19, Florida Statutes.

The respondents brought an action in the Southern District of Florida to compel the Department to file, from its offices located in the territorial jurisdiction of the U. S. District Court for the Northern District of Florida, a state plan with the federal government which would bind the state in the operation of the Medicaid program. The District Court of the Southern District and the Circuit Court concluded that venue lay where respondents were to be paid, rather than where the state agency was headquartered, where the checks originated, and where the state plan was executed; i.e.

the state capitol in the Northern District of Florida.

Venue is governed by the general venue statute, 28 U.S.C. 1391, which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

The law is clear that when a state official or state agency is sued for the purpose of compelling official action, the venue of the case lies in the official residence of the state agency and its executive officer. See O'Neill v. Battisti, 472 F.2d 789 (6th Cir. 1972), cert. den. sub nom. Heitzler v. O'Neill, 411 U.S. 964 (1973); Weil v. New York State Dep't of Transportation, 411 U.S. 964 (S.D.N.Y. 1975); United Dairy Farms Co-op v. Milk Control Comm'n,

47 F.R.D. 1 (W.D.Pa. 1968); transferred, 335 F. Supp. 1008 (M.D.Pa.), aff'd, 404 U.S. 930 (1971); United Office & Professional Workers of America v. Smiley, 75 F.Supp. 695 (E.D.Pa. 1946). The case sub judice clearly conflicts with the holdings in O'Neill v. Battisti and United Dairy Farms, supra.

The Southern District Court ordered the petitioners, all of whom are located in the Northern District, to perform actions in the Northern District; to-wit: preparation, execution and transmittal of the State Medicaid Plan.

If the venue statutes have any meaning and are to be given any significance, this case must be reversed. Failure to reverse will result in a continuation of forum shopping and expose the state to multiple diverse rules regarding identical principles. It will further substantially impinge upon

the congressional authority over the federal district courts as such authority has been exercised in placing venue restraints on such courts.

The decision below fails to conform with the Supreme Court's ruling in Leroy v. Great Western United Corporation, 61 L.Ed. 2d 464 (1979), rev'g, 577 F.2d 1256 (5th Cir.1978), which represents a reversal of the Fifth Circuit on grounds comparable to those now urged. Thus in such case the Fifth Circuit held that venue of an action involving corporate takeover of an Idaho company by a Texas company was not properly placed in Texas but was proper only in Idaho, which was the residence of the defendant and where the action forming the basis of the claim occurred. Clearly, the inadequacy of the state plan prepared in the state capitol caused venue of the case

sub judice to be in the state capitol under the guidelines set forth by this Court in Leroy v. Great Western, supra.

The presence of the federal government as a defendant does not modify the rule as to the state agency's rights as to venue. See De La Fuente v. I.C.C., 451 F. Supp. 867 (1978).

It should also be considered that state law itself mandates that petitioner's residence is in Tallahassee, Florida. See Fla. Const. Art. II, §2 (1968 Rev.); accord, Fla. Stat. §20.19(14)(a) (1976 Supp.). Furthermore, the only proper venue for state defendants in state court actions is in Tallahassee, the state capitol. Carlisle v. Game & Fresh Water Fish Comm'n of the State of Florida, 341 So.2d 1015; see also 34 Fla. Jur. Venue §§27-29 (1961).

It should also be understood that it

is defendant's actions which establish the location of the spot where the claim arose. Thus in Honda Associates, Inc., v. Nozawa Trading, Inc., 374 F. Supp. 886, 889-892 (S.D.N.Y. 1974), and particularly therein at page 891, the Court states:

> [I]n determining where "the claim arose," the weight of defendants contacts in various districts must be compared, and the claim must be deemed to have arisen in the district where the contacts have been most significant.

CONCLUSION

Wherefore, for the reasons set forth and to record for posterity that this Court believed in the rule of law over the desires of man, it is respectfully requested the writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-2745, 77-3467

FLORIDA NURSING HOME ASSOCIATION, et al.,
Plaintiff-Appellants,

v.

WILLIAM PAGE, JR., et al.,
Defendants-Appellees.

GOLDEN ISLES CONVALESCENT CENTER, INC., et al.,
Plaintiffs-Appellants,

v.

PATRICIA ROBERTS HARRIS, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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May 6, 1980

Before AINSWORTH and HENDERSON, Circuit Judges, HUNTER, District Judge.

AINSWORTH, Circuit Judge:

These consolidated appeals arise from separate orders of the United States District Court for the Southern District of Florida. The orders resulted from partial adjudications in two suits brought by several Florida nursing homes against the Florida Department of Health and Rehabilitative Services (DHRS) and its secretary and the secretary and regional director of Health, Education and Welfare (HEW) concerning plaintiffs' rights to receive payments on a "reasonable cost-related basis" for services rendered under the Medicaid program of the Social Security Act (the Act). 42 U.S.C. § 1396 et seq.

Both suits sought to have a regulation issued by HEW, 45 C.F.R. § 250.3(a)(3)(iv) (1976), declared invalid. This regulation establishes January 1, 1978 as the date by

which states participating in the Medicaid program were required to implement a plan to reimburse providers of services on a reasonable cost-related basis. Section 249 of the Social Security Act, 42 U.S.C. § 1396a(a)(13)(E), however, fixes July 1, 1976 as the effective date for implementing such a plan for reimbursement.

In the first suit, brought by Golden Isles Convalescent Center, Inc. and other licensed nursing homes in Dade and Broward Counties, Florida (referred to collectively as Golden Isles), the district court upon plaintiffs' motion for summary judgment held the administrative regulation invalid as inconsistent with the congressional mandate provided for in the Act. In partially granting Golden Isles' motion for summary judgment, the court held that plaintiffs were entitled to payment from the state on

a reasonable cost-related basis prospectively from the date of its ruling, October 18, 1977. It also ordered Florida DHRS to submit a plan effective October 18 and approved by HEW in compliance with the Act's mandate for providing a cost-related reimbursement plan. The court reserved ruling on the question of plaintiffs' entitlement to reimbursement retroactively from July 1, 1976, the date set out in the statute. In its order the court also ruled that its exercise of jurisdiction and venue were proper, despite objections by defendants that exclusive jurisdiction lies in the United States Supreme Court and that venue was proper only in the Northern District of Florida, the location of the main offices of the DHRS. Defendant Florida DHRS appealed the court's order. The issues raised by appellant constitute the substance of the first appeal before us,

which appeal will be referred to as the Golden Isles case (No. 77-3467).

In the second suit, the court also granted a partial summary judgment in favor of plaintiffs, Florida Nursing Home Association and its nursing home members (collectively referred to as Florida Nursing Home). In its order the court incorporated its opinion in the Golden Isles case invalidating the HEW regulation and requiring the state to reimburse plaintiffs on a reasonable cost-related basis from October 18, 1977 prospectively. Once again, a ruling on plaintiffs' right to retroactive relief was reserved by the district court until it considered written memoranda submitted by the parties. No appeal was taken by defendants from this order.

While Florida's appeal from the partial summary judgment in the Golden Isles case

was still pending in this court, the district court consolidated for trial the Golden Isles and Florida Nursing Home cases for a determination whether the current approved plan submitted by Florida DHRS complies with the applicable Social Security statute. In its order the court also entered judgment in favor of defendant Florida DHRS denying plaintiffs Golden Isles and Florida Nursing Home retroactive reimbursement from the state on a reasonable cost-related basis for services rendered prior to October 18, 1977. Plaintiffs appealed the court's ruling regarding their right to retroactive payments. The issue of plaintiffs-appellants' entitlement to reimbursement from the state on a reasonable cost-related basis prior to October 18, 1977 constitutes the substance of the second appeal to be addressed by us, which we will

refer to as the Florida Nursing Home case (No. 78-2745).

Golden Isles Case (No. 77-3467)

In its appeal of the court's partial granting of Golden Isles' motion for summary judgment, appellant Florida DHRS asserts the district court erred in four respects. We disagree and affirm the court's ruling.

I.

[1] Appellant first contends that the district court was without jurisdiction to hear this controversy because original and exclusive jurisdiction lies in the United States Supreme Court. Florida argues that since this action constitutes a controversy between a state and its own citizens under article III, section 2, clause 2 of the United States Constitution, the Supreme Court has original and exclusive jurisdiction.

Appellant's contention is erroneous.

It is well established that the United States Constitution grants neither original nor exclusive jurisdiction to the United States Supreme Court over controversies between a state and its own citizens. C. Wright, Law of Federal Courts 557 (3d ed. 1976). The first paragraph of section 2 of article III of the constitution provides in pertinent part:

> The judicial Power shall extend . . . to Controversies to which the United States shall be a Party;—to controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States . . ..

The second clause, which appellant relies on here, states:

> In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned the supreme Court shall have appellate jurisdiction . . ..

In interpreting these provisions, the

Supreme Court several years ago in California v. Southern Pacific Co., 157 U.S. 229, 258, 15 S.Ct. 591, 602, 39 L.Ed. 683 (1895), made it clear that the language of clause 2 "[i]n all Cases . . . in which a State shall be [a] Party," means in all the cases enumerated in clause 1 of article III, section 2. Nowhere in clause 1 is there mention of a controversy between a state and its own citizens. As the Supreme Court firmly stated: "By the Constitution . . . this court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, but not of controversies between a state and its own citizens . . . ." Id. at 258, 15 S.Ct. at 602. See Texas v. Interstate Commerce Commission, 258 U.S. 158, 163, 42 S.Ct. 261, 263, 66 L.Ed. 531 (1922); Minnesota v. Northern Securities Co., 184 U.S. 199, 245-46, 22 S.Ct. 308, 325-26,

46 L.Ed. 499 (1902).

This rule has been codified in the statutory provision which describes the original jurisdiction of the Supreme Court. See 28 U.S.C. § 1251. Although section 1251(b)(3) provides for the Supreme Court's original, but not exclusive, jurisdiction of all actions by a state against the citizens of another state, there is no provision for controversies between a state and its own citizens.

Golden Isles brought this suit alleging violations by Florida of 42 U.S.C. § 1396a. The district court's ruling that it had jurisdiction over this action pursuant to 28 U.S.C. § 1331(a), which provides for the district court's jurisdiction of all actions arising under the laws of the United States wherein the amount in controversy exceeds $10,000, was thus proper.

II.

Appellant Florida DHRS next contends that venue was proper only in the Northern District of Florida where the principal offices of DHRS and its secretary are located. It asserts that when a state officer or agency is sued for the purpose of compelling official action, venue lies only in the district wherein the agency and its executive officers maintain their official residences. Our review of the statute and the important considerations underlying the choice of a proper forum lead us to conclude that appellant's assertion that venue is improper in the Southern District of Florida is erroneous.

Venue is governed by the federal venue statute, 28 U.S.C. § 1391(b), which provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants

> reside, or in which the claim arose, except as otherwise provided by law.

The general rule in suits against public officials is that a defendant's residence for venue purpose is the district wherein he performs his official duties. 1 Moore's Federal Practice ¶0.142[5.-1-2], at 1396 (2d ed. 1979). See, e. g., Butterworth v. Hill, 114 U.S. 128, 132, 5 S.Ct. 796, 798, 29 L.Ed. 119 (1885); O'Neill v. Battisti, 472 F.2d 789, 791 (6th Cir. 1972), cert. denied sub nom. Heitzler v. O'Neill, 411 U.S. 964, 98 S.Ct. 2142, 36 L.Ed.2d 685 (1973). A number of the cases applying this principle have involved federal officials or agencies and have found only one official residence. See, e.g., Ernst v. Secretary of the Interior, 244 F.2d 344, 17 Alaska 133 (9th Cir. 1957); Trueman Fertilizer Co. v. Larson, 196 F.2d 910 (5th Cir. 1952); Hartke v. Federal Aviation Administration, 369 F.Supp. 471 (E.D.N.Y.1973).

It has been held, however, that a state agency or official does not necessarily have a single residence. See Buffalo Teachers Federation, Inc. v. Helsby, 426 F.Supp. 828 (S.D.N.Y.1976). In Buffalo Teachers Federation the court noted that in suits against federal agencies, the federal government would be faced with serious difficulties if it were forced to answer complaints in a multitude of forums and forum shopping would be greatly encouraged if suits could be brought in any district where a subordinate departmental officer resides. Such problems, however, "are significantly less serious in the context of a suit against a state governmental entity or official." Id. at 829. In the state context, there is little threat of inconvenience or even forum shopping, at least sufficient "to warrant a blanket rule that there may never be more than a single residence." Id. In Buffalo Teachers

Federation the court determined that although the state agency involved had its central headquarters in the Northern District of New York, venue was not lacking in the Southern District where the suit was brought. The agency involved maintained a field office in the Southern District and a significant portion of its business was conducted from that office.

Here, Florida DHRS, though headquartered in the Northern District of Florida, maintains a large office in the Southern District and much of its business is transacted from that office. Furthermore, the venue statute makes it clear that the residence of defendants does not provide the only basis for venue. Venue is also proper in the district where the claim arose. Though the legislative history of section 1391(b) fails to suggest what the draftsmen thought about the question of where

a claim arises, 1 Moore's Federal Practice ¶0.142[5.-2], at 1423 (2d ed. 1979), when the statute was amended to extend venue to a district "in which the claim arose," the purpose was to "facilitate the disposition of . . . claims by providing a more convenient forum to the litigants and witnesses involved." H.R.Rep.No. 1893, 89th Cong., 2d Sess 2 (1966). Thus, "where the claim arose" should be "ascertained by advertence to events having operative significance in the case, and a common-sense appraisal of the implications of those events for accessibility to witnesses and records." Lamont v. Haig, 590 F.2d 1124, 1134 (D.C.Cir.1978) This is not to suggest that only a single district can satisfy the statutory standard with respect to any given claim. Often, the factors deemed determinative might well indicate the suitability of several forums. See, e.g., Commercial Lighting Products, Inc. v.

United States District Court, 537 F.2d 1078, 1080 (9th Cir. 1976); Tefal, S.A. v. Products International Co., 529 F.2d 495, 496-97 (3d Cir. 1976); Gardner Engineering Corp. v. Page Engineering Co., 484 F.2d 27, 32-33 (8th Cir. 1973). In any case, the court should not oppose the plaintiffs' choice of venue if the activities that transpired in the district where suit is brought were not insubstantial and the forum is a convenient one balancing the equities and fairness to each party. Lamont v. Haig, supra, 590 F.2d at 1134 n. 62; Weil v. New York State Department of Transportation, 400 F.Supp. 1364, 1365 (S.D.N.Y. 1975).

Applying this standard, then, it is clear that venue properly lies in this matter in the Southern District of Florida. Not only does appellant maintain a large office there but the payments which Golden Isles is

seeking were allegedly due it within the Southern District where Golden Isles and the other plaintiffs-appellees are located. This is sufficient in the circumstances of this case to justify the placing of venue in the Southern District of Florida.

III.

Appellant's third contention is that the Eleventh Amendment to the United States Constitution bars the district court's directive that the Florida agency submit a plan for reimbursing Golden Isles in accordance with the requirements of the Medicaid statute. Appellant argues that the court's order constitutes a prohibited ruling against the state itself, binding the state in contravention of the Eleventh Amendment to a particular course of conduct. Florida's argument is without merit.

The Supreme Court held in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d

662 (1974), that a federal court decree mandating that a state officer or agency administering a federal entitlements program comply with the requirements of the federal act creating the program is not void by virtue of the Eleventh Amendment, even though the state official will necessarily be required to spend money from the state treasury to carry out the court's order. Id. at 667-68; 94 S.Ct. at 1357-58. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This is a well-established principle and has been applied consistently by courts in cases involving matters similar to that confronting us here. See Rothstein v. Wyman, 467 F.2d 226, 236 (2d Cir. 1972), cert. denied. 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973); Hempstead General Hospital v. Whalen, 474 F.Supp. 398, 406 (E.D.N.Y.1979); Alabama

Nursing Home Association v. Califano, 433 F.Supp. 1325, 1330-31 (M.D.Ala.1977); Pharmacists Society of Milwaukee County, Inc. v. Department of Health and Social Services, 79 F.R.D. 405, 408 (E.D.Wis.1978).

Here, the district court's order does no more than require Florida DHRS, prospectively from the date of its order, to comply with the Social Security Act's mandate that it reimburse providers of skilled nursing services on a reasonable cost-related basis. Judicial enforcement of the statute's requirements is therefore appropriate, see Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), and the Eleventh Amendment is no bar where by its terms the court's decree is prospective in nature. Edelman, supra, 415 U.S. at 667-68, 94 S.Ct. at 1358.

IV.

Appellant's final contention is that the court improperly granted in part Golden Isles' motion for summary judgment since there exists a material issue of fact as to whether the state's current Medicaid plan meets the requirements of section 249 of the Social Security Act. Florida's contention misperceives the court's ruling.

In its order the district court did not rule that the current Florida Medicaid plan was not in conformity with the Act's requirement that the agency reimburse providers of services on a reasonable cost-related basis. Rather, the court's order merely directed HEW, in accordance with section 249, to determine whether the current Florida plan is in conformity with the statute. If HEW's determination was adverse to the state, Florida DHRS was directed to submit a conforming plan

to be approved by HEW. Once HEW approved the plan, the final determination whether the plan meets the requirements of section 249 was reserved for trial. Thus, the court's order was not dispositive of any factual dispute.

The district court did not err, therefore, in partially granting Golden Isles' motion for summary judgment as there were only issues of law presented and plaintiffs were entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Nunez v. Superior Oil Co., 572 F.2d 1119, 1123 (5th Cir. 1978).

Accordingly, this judgment is AFFIRMED.

Florida Nursing Home Case
(No. 78-2745)

In this consolidated case, appellants Florida Nursing Home and Golden Isles appeal from the court's order denying their claim

for reimbursement on a reasonable cost-related basis for nursing services provided by appellants prior to October 18, 1977, the date of the court's entry of a partial summary judgment in the Golden Isles litigation. This appeal presents one basic issue: whether the Eleventh Amendment to the United States Constitution operates as a bar to the retroactive relief sought by appellants. We find that under the circumstances of this case, Florida has waived its Eleventh Amendment immunity by consenting to be sued in federal court under the terms of its contracts with appellants.

Under the Eleventh Amendment an unconsenting state is immune from suits brought in federal court by her own citizens. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890); Parden v. Terminal Railway, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

It is well established that suits brought against an agency of the state are in fact suits against the state and covered by the Eleventh Amendment. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). Defendant-appellee Florida Department of Health and Rehabilitative Services is an agency of the Florida state government created by the Legislature. See Fla.Stat.Ann. § 409.016 et seq. (West 1973 & Supp.1979). The relief sought by appellants is reimbursment from the state agency on a reasonable cost-related basis as required by section 249 of the Social Security Act for nursing services rendered from July 1, 1976, the effective date of the Act. As noted earlier, the

district court's order denied such relief for any services provided prior to October 18, 1977, the date of the court's ruling. The effect of an award granting Golden Isles and Florida Nursing Home their requested relief will require the payment of state funds as a result of a past breach of a legal duty on the part of the state. Since this relief is retroactive in nature, if not consented to by the state, plaintiffs' action in federal court is barred by the Eleventh Amendment. Edelman, supra, 415 U.S. at 668, 94 S.Ct. at 1358. Thus, the sole issue reduces itself to a determination whether the State of Florida has consented to this action and effected a waiver of its sovereign immunity under the Eleventh Amendment.

For the purposes of this suit, the Florida Department of Health and Rehabilitative Services

is governed by Fla.Stat.Ann. § 402.34 (West Supp.1979). This section provides in pertinent part:

> The department is a body corporate . . . .. It shall have the power to contract and be contracted with, to sue and be sued in actions ex contractu but not in torts, and to have and to possess corporate powers for all purposes necessary to administer this chapter. . . .

By creating this department with authority to sue and be sued the State of Florida has expressly waived its sovereign immunity. This language, standing alone, however, does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. See Smith v. Reeves, 178 U.S. 436, 441, 20 S.Ct. 919, 921, 44 L.Ed. 1140 (1900); Scott v. Board of Supervisors, 336 F.2d 557, 558 (5th Cir. 1964).

Nevertheless, the state has done more here than merely waive its general immunity

from suit in its own state courts. Pursuant to its corporate powers as outlined in section 402.34, Florida DHRS drafted and executed a contract with each appellant which outlines the precise obligations of the agency and the provider of services and which each provider signed as a prerequisite to its participation in the Medicaid program. The sixth paragraph of the agreement which Florida entered into with appellants states:

> Both the provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

By contracting with appellants to be bound by all federal laws applicable to the Medicaid program, the state has expressly waived its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach

of these laws.

While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, Edelman, supra, 415 U.S. at 673, 94 S.Ct. at 1361, the "overwhelming implication," id. 94 S.Ct. at 1361, of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity by requiring the DHRS to recognize and abide by all federal laws in participating in the Medicaid program. To bar federal court jurisdiction in this case could operate to immunize state officers and the agency from their contractual duty to adhere to federal statutory requirements. See generally New York State Association for Retarded Children v. Carey. 596 F.2d 27, 39 (2d Cir. 1979). A contrary holding in the circumstances of this case, where appellants

Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result. Accordingly, we reverse this judgment of the court.

AFFIRMED, as to Golden Isles Case (No. 77-3467).

REVERSED, as to Florida Nursing Home Case (No. 78-2745).

APPENDIX II

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

NO. 76-1810-Civ-WMH

GOLDEN ISLES CONVALESCENT CENTER, INC., d/b/a HALLANDALE REHABILITATION CENTER, et al.,

Plaintiffs,

vs.

JOSEPH A. CALIFANO, JR., individually, and as Secretary of Health, Education and Welfare, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT

October 18, 1977

Before HOEVELER, United States District Judge

HOEVELER, District Judge:

Certain nursing home operations located

in this District have brought suit against the State Department of Health and Rehabilitative Services, the Federal Department of Health, Education and Welfare, and their respective executive officers to require implementation of Public Law 92-603, Sec. 249, 42 U.S.C. Sec. 1396a(13)(E), hereinafter Sec. 249).

Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1331. Venue, though objected to by the State defendants, lies in this district.

At the present time, the plaintiffs' Motion for Summary Judgment is before this Court. As will be set out more fully in this opinion, the Court is unable to adjudicate the whole case upon the present state of the pleadings and will therefore treat Plaintiffs' Motion as one brought under Rule 56(d), Federal Rules of Civil Procedure.

Plaintiffs are providers of skilled nursing facility services to the State of Florida which participates in the Medicaid Program with the Federal Government. Under the program, payments are made by the designated State agency to qualified beneficiaries, including Plaintiffs. These payments come from State and Federal sources and are made in accordance with regulations approved by the Secretary of Health, Education and Welfare.

This dispute centers around the regulations issued by HEW (45 C.F.R. Sec. 250.30 (a)(3)(iv)) requiring the State participants to provide reimbursements "on a reasonable cost related basis" to skilled nursing home facilities. The regulation sets an effective date of January 1, 1978. However, Section 249 sets an effective date of July 1, 1976. HEW contends that it was slow in

promulgating regulations and that it did not wish to penalize State participants for its own delay.

Since this case was commenced, the opinion of Judge Frank M. Johnson, Jr., in Alabama Nursing Home Association v. Califano, 433 F. Supp. 1325 (M.D. Ala. 1977) has been filed. Many of the same arguments brought before this Court by plaintiffs and defendants were addressed by Judge Johnson in some detail.

This Court is in substantial agreement with Judge Johnson that the portion of 45 C.F.R. Sec. 250.30(a)(3)(iv) setting an effective date of January 1, 1978, for implementation of Section 249 is inconsistent with the Congressional mandate. Therefore, the regulation is invalid insofar as it sets an effective date other than July 1, 1976.

The State of Florida has a present ability to calculate nursing home reimbursement rates on a cost related basis within the

meaning of Section 249. The deposition of Hugo Jordan, Reimbursement Supervisor, Nursing Home Program, State Department, Florida Department of HRS establishes that the State has the necessary data to promulgate a plan conforming to Section 249 on cost related basis effective immediately. There is some dispute as to whether or not the present plan conforms to Section 249, but the mandate of Congress clearly calls on the Secretary of HEW to make this determination administratively.

Accordingly, the Department of HEW is hereby directed to determine whether the plan of the State of Florida is in present conformity with the requirements of Section 249. The Department must determine whether the current Florida plan provides for reimbursement on a reasonable cost related basis to skilled nursing care providers.

The Department is directed to advise this Court of its determination within ten (10) days of the date of this Order. If the present plan (as is strongly urged by Plaintiffs) is not conforming, in the opinion of the Secretary, the State defendants are directed to submit a plan for approval to the Secretary no later than thirty (30) days from the date of this Order. Additionally, any plan submitted to the Department of HEW for approval by the State must make provision for the reimbursement to plaintiffs on a reasonable cost related basis for services rendered from the date of this Order prospectively. The Department of HEW is prohibited and enjoined from approving any State plan not providing for the reimbursement of these plaintiffs on a reasonable cost related basis as of the date of this Order.

The question of plaintiffs' entitlement to retroactive relief will be reserved at this time. Plaintiffs are directed to submit memoranda on this point no later than November 4, 1977. Defendants shall submit opposing memoranda by November 18, 1977. No further memoranda in response shall be allowed except upon leave of Court.

DONE AND ORDERED this 18th day of October, 1977, at Miami, Florida.

/s/ William M. Hoeveler
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1980, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to WILLIAM KANTOR, Attorney, Civil Division, Rm. 3631, Department of Justice, Washington, DC 20530; DEMPSEY & SLAUGHTER, P.A., 610 Eola Office Center, 605 E. Robinson St., Orlando, FL 32801, and ELLIOT SHAW, ESQUIRE, Suite 611, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132.

James G. Mahorner

JAMES G. MAHORNER
Assistant General Counsel

Counsel for Petitioner

ADDITIONAL CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 1980, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to WADE H. McCREE, Solicitor General, U. S. Department of Justice, Rm. 5143, Constitution Ave., Washington, DC 20530.

James G. Mahorner

JAMES G. MAHORNER
Assistant General Counsel

Counsel for Petitioner